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Optimising project finance solutions in the water sector

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9. DEALING WITH EXISTING PPPS AND RE-NEGOTIATION

“A deal is a prediction...deal makers’ predictions at a negotiating table inevitably have to confront the realities of change later on.” (Salacuse, 1991)

9.1 Introduction

The nature of contracts in the water and wastewater sector renders them susceptible to the impact of unforeseen or unpredictable events. With contract durations of 25 years and above, the greater the exposure of the arrangement to environmental, commercial and political risks. Such events can alter the economic balance of the relationship that was assumed by each party upon the signing of the arrangement, making operation of the PPP agreement no longer viable from commercial and financial perspectives. In most cases, neither party will wish to take the drastic step of terminating the contract or withdrawing⁹¹. Instead, experience and practice suggest that the inclusion of renegotiation and adaptation clauses in contracts can help address such circumstances. This is why the previous chapter introduced clauses related to variations. What I argue in this chapter (and hence the need for a separate chapter) is that a ‘structured renegotiation’ process that is in-built in the PPP agreement can allow both parties to maintain the contractual relationship with all the associated benefits whilst dealing with a difficult issue which would have otherwise triggered a termination right for one of the parties. Yet these provisions come loaded with consequences for the PPP agreement and the business relationship between the two parties. It follows that there is a difficult balance to play within the PPP agreement that allows the parties to deal with the issue at hand but does not open the contract for superfluous renegotiations. The premise of my recommendations contained in this chapter is that care must be taken at the outset of the design of a PPP arrangement to establish general renegotiation clauses which specifically define when a change of circumstances and its impact is serious enough to trigger a renegotiation. Doing so increases the chances of PPP agreements surviving.

⁹¹ Exercising a right to termination is not the issue. My research has shown that in most cases the Developer may have a right to termination but is loath to exercise that right as it would mean the end of the PPP agreement. This was the case in Buenos Aires Argentina where the clause linking the convertibility of the peso at parity with the dollar was breached by government’s actions. The Developer clearly had the right to termination but did not wish to exercise such right. Similarly, my personal experience in Ecuador Guayaquil where I acted as a mediator between the Grantor and the Developer Interagua, shows the reluctance of the Developer to exercise its termination rights. In the words of the Director for Regulatory Affairs of Interagua Mr Geoff Thorpe, “We know we can exercise our right to termination, but we also know that would lead to our divorce. In that event we will only recover our investments in the courts and our Board [referring to the Board of Directors and shareholders of Interagua] will not get their money back in many years”.

9.2 Why should Renegotiation and Adaptation Clauses be considered as part of the PPP agreement

My research suggests that there are some common causes for renegotiation requests. For Governments these typically include when the fiscal regime (taxes, tariffs, subsidies) are affected by external events, altering the economic balance of the arrangement; when Developers obtain a higher return from their operations due to decreases in commodity prices; or due to pressure from the imposition of technical and environmental standards in existing contracts or enactment of said standards through legislation⁹².

On the other hand, for Developers renegotiations may occur when, due to unforeseen events (such as improved knowledge of assets conditions etc), the economic viability of the PPP agreement is untenable; when obligations are imposed on the PPP agreement (environmental obligations etc) reducing the level of returns envisaged upon embarking into the partnership; or when government policies have a detrimental effect on the minimum rate of return through reductions on tariff levels or demands to subsidize costs to allow greater access.

Other issues which may influence the need to specify renegotiation clauses within a PPP agreement may include, for example:

Government Intervention: Renegotiation can often be invoked due to the unexpected intervention of governments into contractual relationships such as new laws etc. In some instances changes in law may not be considered as a Grantor's failure to honour its contractual obligations and Governments must retain the right to enact new laws etc. Experience shows that the Anglo-American legal approach to contracts is preferred to court arbitrated changes to contracts⁹³.

Environmental Risks: Water and wastewater sector contracts are also likely to face environmental risks over the duration of the arrangements. Environmental pressure groups can lobby the government for the cancellation or suspension of a PPP agreement that is viewed as threatening to the environment. Similarly, as mentioned above, the cost of having to comply with new environmental regulations and standards (water purity levels, treatments levels for wastewater) can also bring about unforeseen costs to the operation of a PPP agreement. Events of this nature are not unusual in developing countries which may not have developed their environmental regulations and may take an accident by accident approach to developing them. Continuing the economic viability of the project in the face of the new environmental costs may require renegotiations.

Change in Government: A change in government does not always prelude a renegotiation nor by itself constitute a legal basis for renegotiation. However, experience has shown that any controversial contracts or PPP agreements entered into by previous governments are often liable to be renegotiated by the new government which may cite allegations of impropriety over the original arrangement.

Against this backdrop, explicit renegotiation clauses may provide protection to both the Grantor and the Developer by guarding a state's sovereign right to change laws that may affect the PPP agreement as well as providing protection to the Developer. A renegotiation clause is a contract provision that, upon the occurrence of a certain event or events, requires

⁹² This was the case for example in Eastern Europe where allowances had to be made in contracts to ensure that there was compliance with EU standards such as the Water framework Directive.

⁹³ The critical factor demonstrated by United States Supreme Court decisions is that regulatory changes may not always be regarded as a failure to honour a contractual obligation. English courts (mainly related to England, Wales and Northern Ireland but not Scotland) also remain reluctant to allow parties to commercial agreements to alter contractual arrangements even in situations of unexpected changes in industry or sector law.

all parties engaged in a contract to renegotiate the terms of their agreements (Gotanda 2003). Various legal arguments (Gotanda 2003, Waelde and Kola 2004, World Bank 2004) recommend that contracts should not attempt to use stabilization mandates against governments changing laws that would disrupt the financial balance of the contract. Instead, Grantors should retain this right under the proviso that any changes will automatically give the Developer the right to renegotiate or adapt the contract in order to re-balance the contract.

Waelde & Kolo (2004), identify five main drawbacks with including renegotiation provisions in a contract:

- *They reduce contract stability:* Contracts and partnerships rely upon predictability and enforceability. Adaptation and renegotiation clauses can breed scepticism in the viability of the arrangement from the outset⁹⁴. For example, US Courts system (other legal systems are discussed later in this chapter) are notoriously reluctant to include compelled renegotiation and adaptation clauses as these are not used regularly in common law countries as they are in civil law countries.
- *They may raise the costs of transactions:* These provisions can create uncertainty of economic return which can either dissuade a Developer from entering into a PPP agreement, or will force them to “structure the investment in such a way as to increase returns to offset the risk created by the environment.” (Salacuse 2000)⁹⁵
- *Difficulty in engaging a third-party to resolve disputes:* if a renegotiation clause is included and activated and each party is unable to satisfactorily resolve their issues, some legal arguments suggest that if no agreement can be reached, there is no dispute and no breach of contract (Gaillard and Savage 1999)⁹⁶. Without a dispute, an arbitral tribunal may not possess jurisdiction and any decisions made may not be enforceable. In Gotanda (2003) he explores that when an arbitral tribunal is requested to adapt a contract, this may not necessarily constitute a disagreement. This is important as the recognition of a dispute is a prerequisite for arbitration under the ICSID Convention⁹⁷ and the UNCITRAL⁹⁸ Model Law which are the bases for many national arbitration

⁹⁴ The principle being that if a PPP agreement needs a renegotiation clause from the beginning it would imply that such arrangement is incomplete or would require a renegotiation from the beginning. In practice this is not what renegotiation provisions aim to address nor are they included to encourage reckless bidding by Developers with the hope that they can exercise renegotiations rights once they have entered into the life of the PPP agreement.

⁹⁵ Transaction costs may increase as the cost of financing the PPP agreement will increase as investors and or the Developer would seek assurances against uncertainty by demanding a higher return on its investment. Another consequence would be that the Grantor could lose foreign investment.

⁹⁶ Gotanda refers readers to Fouchard *et al* (1999).

⁹⁷ The International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank group based in Washington, D.C., was established in 1966 pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or Washington Convention). As of May 2005, 155 countries had signed the ICSID Convention. ICSID Regulations and Rules have been amended and these revised rules are in effect from April 10, 2006.

⁹⁸ The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonization and unification of international trade law". It is the Commission that formulates and regulates international trade in cooperation with the World Trade Organisation.

laws⁹⁹. The uncertainty over this issue often dissuades parties from inserting renegotiation provisions into the contract.

- *Lack of guidance for tribunal contract adaptation:* Without specific instructions on how the tribunal should go about adapting the PPP agreement, the tribunal may be averse to involving itself in adapting a contract. If tribunals proceed to adapt a PPP agreement without specific guidelines, the final agreement may contain provisions which neither party would have agreed with prior to engaging the tribunal and may produce a profoundly different arrangement than otherwise desired.
- *Events that trigger renegotiation may be within the control of government:* A major concern resides in whether it is sensible to allow renegotiation and adaptation clauses to be triggered by events within the control of the Grantor. If the contract is renegotiated favourably towards the Grantor, the government has gained an advantage and therefore profited from having the clause invoked. The best outcome for the Developer would be that renegotiation would place the arrangement back to the same economic balance which it enjoyed prior to renegotiation.

In contrast to the identified disadvantages, the provision of renegotiation clauses with attached clauses for third party arbitration to adapt the PPP agreement in the event of unsuccessful renegotiation, has many advantages according to Gotanda (2003, p 69-71):

- *Stabilize the relationship between government and Developer:* Clauses allowing renegotiation can reduce the likelihood that parties to an agreement will choose to terminate a relationship. Flexibility in a PPP agreement that allow for renegotiation of certain terms under certain circumstances can lessen the risk of disputes that can permanently sour a relationship.
- *Allows for flexibility:* Any Developer, prior to committing to a contract of long duration, will want to be assured of the stability of the investment regime, that the PPP agreement will be adhered to and respected by the Grantor and the rules of the game will not be altered¹⁰⁰. Furthermore, the Developer's sponsors (banks, insurance agencies and customers) will also require this assurance. However, the Grantor that owns the water and wastewater sector resources often enters into a long term arrangement for the management of these resources with imperfect data about the condition of the assets (See Chapter 11), resources available and the future price that it can command. It will therefore require flexibility in the PPP agreement to deal with changes in circumstances¹⁰¹.
- *Allow contracts to deal with unforeseen or force majeure related events:* Provisions may prove more palatable to each party should the clauses be restricted to events that are out of the control of either party. Provisions for force majeure events are highly common in

⁹⁹ If national laws do not recognize a tribunal to adapt the terms of a PPP agreement to be a dispute, the tribunal will not have the jurisdiction to adapt the agreement/contract. If the tribunal asserts its jurisdiction without authorization, the contract may be unenforceable under the New York convention.

¹⁰⁰ By rules we mean, issues to do with rights, titles, currency regulations, labour and environmental laws.

¹⁰¹ Take the example of a Grantor that is unsure and unable to obtain information about the condition of the underground water assets. It then prices the cost of refurbishments and repairs into the subsidy and tariff levels in the PPP agreement with a Developer. If the Developer discovers that the underground assets do not require the level of repairs as predicted in the PPP agreement, the Grantor may feel that the tariff and subsidy levels are overly generous and may demand a readjustment of the PPP agreement. On the other hand, the reverse may be true and the Developer may require a greater subsidy.

contracts and are often seen as facilitators for the contractual relationship rather than increasing uncertainty¹⁰².

- *Maintain reputations:* The failure of a major PPP agreement damages the reputation of the Grantor and the participating Developer. The political risk profile and investment climate perceptions of a country may be negatively impacted if there is a failure in a PPP agreement. Similarly, the Developer may face criticism from its peers and could be tainted by the investment community affecting its ability to raise money. Failed projects have serious negative repercussions and renegotiations may be a way to mitigate these repercussions. The possibility of tarnishing of a government or Developer's reputation and credibility can act as a very strong incentive against violating the rules of the game.

9.3 Legal Issues related to Renegotiations

Renegotiation of contracts including PPP agreements opens up a whole series of legal debates on the sanctity of contracts versus flexibility of contracts. According to Waelde & Kolo (2004), this also reflects the tension between the binding nature of the legal instrument of contract – meant to commit the parties for a long time whatever their changing position, relation and interests, and the practical and commercial difficulties to being fully and specifically committed to certain obligation and courses of action when the reasons underlying the contract in the first place have changed drastically. As a general principle of contract law, the concept of the sanctity of the contract is widely accepted by all modern legal systems and is upheld by international tribunals. But under no municipal or international system has the principle of sanctity been found to be absolute. Some believe that classic contract principles over discrete transactions are not applicable to long-term 'relational' contracts with long durations. Instead, a relational contract is instead a framework for co-operation between parties¹⁰³.

The provision of renegotiation has many advantages (Gotanda, 2003) as described above. Importantly including such renegotiation clauses with associated clauses for third party arbitration to adapt the PPP agreement in the event of unsuccessful renegotiation is key to these types of clauses being acceptable to both the Grantor and the Developer. In other words, agreeing to include renegotiation clauses within the PPP agreement does not dilute or preclude each party's right to arbitration.

¹⁰² It must be noted however that this may not erase the issue of whether a tribunal's adaptation of a contract is viewed as a dispute as discussed above.

¹⁰³ During the course of this research a number of French, Spanish and British operators were interviewed. It was interesting to note that generally the French companies (Vivendi, Sour and Suez) all regarded long term PPP agreements as contracts where the relationship between the parties was crucial – thus 'relational' contracts. This may have to do with the fact that their genesis is in their original water contracts done in Napoleonic times.

*Applicable Law – Common and Civil Law systems*¹⁰⁴

Renegotiations occur under the remit of the applicable law under which the original contract was signed. If each party chooses national law to govern the PPP agreement, national law will determine the manner in which renegotiations may occur. Often in financial agreements, parties agree to the use of laws of another state, in which case, the law of another state will determine the applicability of renegotiations. If international law only is chosen, certain difficulties can arise as international law governing contracts is not very well defined. If negotiations over adaptation requests are not settled and are referred to a contract's dispute resolution mechanism – an arbitrary tribunal – the tribunal's decision will be made according to which law the arbitrators consider to be applicable. In situations where parties, unable to agree on a system of law, choose a hybrid of national law, international law and generally recognized principles of law, arbitrators will attempt to calculate how each system treats the issue and attempt to identify any commonalities. Generally, arbitrators have a natural tendency to select principles which reflect international consensus and will reject principles of national law that counter generally accepted international practice. The lesson to be taken from this in my opinion is that both parties, when negotiating renegotiation clauses, should consider how a hypothetical tribunal would deal with a renegotiation and what the applicable law would be.

*Common Law Systems*¹⁰⁵, generally identified with English law, places a particular focus on detailed legal drafting and regulation by contract and as a result display less flexibility for contract renegotiation. The sanctity of the contract is regarded as paramount. If renegotiations are to be considered, detailed provisions should be incorporated into the contract through escape/hardship/indexation and adaption clauses. Judges operating under common law systems generally choose not to intervene in contracts and uphold the validity of existing agreements. American courts tend to allow a narrow degree of flexibility, allowing contractors to withdraw from onerous contracts if changes directly impacting the contract's economic balance occur, if the changes were unexpected and if holding the contractor party to the agreement could lead to damaging consequences for the contractor¹⁰⁶.

Civil Law systems are much more amenable to the renegotiation of long term contracts than Common law systems in the English tradition. Civil law systems view contracts as valid so long as the conditions that upheld the conclusion of a contract continued to exist (*rebus sic stantibus*- from the Latin: "things standing thus" or "things thus standing")¹⁰⁷. While civil law

¹⁰⁴ Consultations and discussions were had with the international legal firm of Allen&Overy, specifically with Messrs Troy Edwards, Nigel Pritchard and John Scriven (various consultations between February 2008 and May 2009), with regard to renegotiations and the implications of the various legal systems with respect to this. Some of these views are included in this chapter based on what is considered international best practice.

¹⁰⁵ For a more detailed description on the general differences between Civil and Common law legal systems see Chapter 5, Legal framework.

¹⁰⁶ During this research it was evident that United States law remains very strict and narrow with regards to renegotiation.

¹⁰⁷ The concept of *rebus sic stantibus* stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the agreement in question. In public international law, *clausula rebus sic stantibus* is the legal doctrine allowing for treaties to become inapplicable because of a fundamental change of circumstances. It is essentially an "escape clause" that makes an exception to the general rule of *pacta sunt servanda* (promises must be kept). *Clausula rebus sic stantibus* only relates to changed circumstances that were never contemplated by the parties. Because the doctrine poses a risk to the security of treaties as its scope is relatively unconfined, it requires strict regulations as to the conditions in which it may be invoked. Further details can be

systems do not provide simple exit strategies from a contract, lawyers can draw upon past cases and legal decisions to support their arguments for renegotiation and adaptation of contracts. Many countries civil law systems are shaped by their national political and economic experiences¹⁰⁸ and recognize a restricted '*rebus sic stantibus*' that allows for termination and renegotiation and empowers courts to enforce contractual adaptations¹⁰⁹.

Where a contract can still be operated, albeit under onerous conditions for one party due to severe changes in the assumptions underpinning the contract, civil and common law systems demonstrate a divided judgment on whether allowing renegotiation and whether adaptation is justifiable. Renegotiation is likely to be only agreed upon where there is a long term PPP agreement with parties having to continue to perform under drastically changed and excessively onerous new conditions.

9.4 International Business Practices for Renegotiations

As a result of the grey areas between national and international law approaches to renegotiation and the specific mechanisms for contract adaptation, my research shows that international investment business practices have developed templates for contracts that balance the binding nature of long-term contracts, with the necessary adjustment mechanisms required to maintain the economic equilibrium of a project throughout the PPP agreement's duration. These templates have developed over the course of project finance transactions in the water and wastewater sector, learning from the successes and perhaps most importantly from the failures. These templates seek to address the typical risks that Grantor-Developer contracts face – technical, commercial, regulatory, environmental and political risks. Furthermore there are growing techniques (such as Comparative law described below) which can effectively be used to deal with variations and renegotiations. The international business community regards some form of PPP agreement adaptation provision(s) as critical to ensuring the long-term health of the business relationship and the economic viability of the PPP agreement. International investment/trade institutions and associations have recognized the need for clearly defined mechanisms for contract adaptation through the use of special rules provided by facilities such as the World Bank's Centre for the Settlement of Investment Disputes¹¹⁰ or the Contract Adaptation Rules of the International Chamber of Commerce¹¹¹ or the UNCITRAL Conciliation Rules¹¹². The ICC and UNCITRAL both advocate for renegotiation proceedings should there be any drastic changes to the assumptions on which the PPP arrangement was originally signed.

found in Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331)

¹⁰⁸ For example, Germany allows the termination of judicial adaptation of PPP agreements and other contracts in the event of severe changes to the main parameters governing the economic balance of a contract that have made the contract valueless to the affected party. French law allows contractual escape should the foundation of a PPP agreement be affected by an unforeseen event which severely disrupts the contract's benefit allocation ie that the economic equilibrium has been breached to such an extent that it is no longer economically beneficial to a party to continue with such contractual arrangement.

¹⁰⁹ It must be noted that restrictions do apply in many countries which uphold the '*rebus sic stantibus*' principle and it is not easy for parties to escape their contractual obligations.

¹¹⁰ <http://icsid.worldbank.org/ICSID>

¹¹¹ <http://www.iccwbo.org/>

¹¹² <http://www.uncitral.org/>

The UNIDROIT Principles of International Commercial Contracts provide guidance on conducting renegotiations and the conditions under which they can occur. The Principles allow for renegotiation in the event of a 'hardship' which is defined as:

The occurrence of events (that) fundamentally alter the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of events was not assumed by the disadvantaged party.

In the event of a hardship, the disadvantaged party can invoke a renegotiation of the terms of the contract in order to modify it to reflect the altered parameters. If a successful renegotiation does not occur, the UNIDROIT principles call for the use of a third party to end the contract or adapt it to restore its balance. Both the government and the Developer can alter the contract to reflect changed circumstances out of its control. Some courts have argued that the principle of fairness should be used to adapt the PPP agreement. The UNIDROIT principles provide guidance on this to tribunals¹¹³.

Other international commercial transactions have developed a similar concept of "hardship" clauses which provide a party with the opportunity to request an adaptation of a contract's provisions if continued operation under those contract terms would be economically unfeasible. Such hardships can include acts of god or economic (fiscal) problems. The main premise behind such provisions is under such circumstances, no party should be forced to continue operating as this would compromise the long-term benefit of the contractual relationship¹¹⁴.

Akin to the hardships clause, and as discussed in Chapter 9, force majeure differs in that it may cause the termination or suspension of the contract. However, according to Yates (1999) when a force majeure event occurs, the government and the Developer would rather "seek to maintain the contractual relationship but to implement the term in a modified term, adapted to new circumstances"(Yates,1990). Effective provisions for hardship and force majeure clauses should not only stipulate a moral obligation on both parties to negotiate in good faith, but also to provide mechanisms for third party resolution of a dispute should negotiations in good faith fail. Such clauses are recommended for long-term projects where unexpected

¹¹³ Article 6.2(3), provides for "In (adapting the PPP agreement,) the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive performance may still benefit from that performance"

¹¹⁴ Experience from the oil, gas and mineral sectors show that it is feasible to have PPP agreements with formal renegotiation clauses that allow each party to invoke negotiations to restore the economic balance of a contract. Additionally, stabilization clauses are increasingly common. These clauses are invoked when government interventions such as change in law, change in taxation regime etc affect the balance of the PPP agreement. Furthermore, my research suggests that certain petroleum contracts contain highly specific renegotiation and contract adaptation mechanisms that deal with specific issues (conclusion reached after discussions with Mr Christopher Sheldon Senior Energy, Oil and Mining Expert of the International Finance Corporation and World Bank June 2008, as well as review of some gas contracts in Latin America (details withheld for confidentiality reasons). Furthermore, discussions were also had with Allen & Overy Mr Troy Edwards. It is my recommendation that such practice can be replicated in the water and wastewater sector, should either party have particular concerns over a specific risk.

events can mean that carrying out contractual obligations become onerous and economically unfeasible.

Finally, *Comparative law* is a technique for comparing how major legal systems handle common subjects¹¹⁵. In the case of renegotiations, utilizing a comparative law approach can assist each parties' negotiators with information on common triggers across different legal systems for invoking renegotiations and to identify generally recognized legal practices¹¹⁶. When drawing up agreements, if neither party can agree on a legal system to govern the PPP agreement, the parties are likely to come to an agreement on having the contract governed by legal practices that are common among major legal systems. The parties may also agree to identify where there is a difference among major legal systems and where the method to refer to the generally recognized principles will not lead to an absolutely clear and straightforward result.

9.5 Summary and Conclusions

International commercial business practices in contracting regards provisions for renegotiation and adaptation as an organic element of business contracts, particularly in long term arrangements. I fully concur with this principle. My research shows that this principle stems from the main premise that parties to an agreement should not be forced to comply with unexpectedly tough terms in a PPP agreement in the interests of maintaining the business relationship in the long-term¹¹⁷. Each party should be expected to absorb the short term costs of the unexpected event until renegotiations or a PPP agreement adaptation has occurred. Furthermore there are growing techniques (such as Comparative law described) which can effectively be used to deal with variations and renegotiations.

My research also reveals that renegotiation of an agreement should only be allowed in exceptional circumstances and that parties to a contract should bear their allocated risks except in the event of unforeseen events that affect the assumptions on which the agreement was made¹¹⁸. This is particularly important as allowing parties to withdraw or not comply with contractual obligations creates uncertainty and can affect the long-term investment climate. Furthermore, the legal assessment undertaken as part of this research suggests that generally recognized legal principles do recognize (albeit it narrowly) the right of a party whose

¹¹⁵ Wikipedia defines Comparative law as an academic study of separate legal systems, each one analysed in its constitutive elements; how they differ in the different legal systems, and how their elements combine into a system. Several disciplines have developed as separate branches of comparative law, including comparative constitutional law, comparative administrative law, comparative civil law (in the sense of the law of torts, contracts and obligations), comparative commercial law (in the sense of business organisations and trade), and comparative criminal law. Studies of these specific areas may be viewed as micro- or macro-comparative legal analysis, i.e. detailed comparisons of two countries, or broad-ranging studies of several countries. Comparative civil law studies, for instance, show how the law of private relations is organised, interpreted and used in different systems or countries.

¹¹⁶ Generally recognized legal practices may include a given approach to compensation, use of independent (experts) in the determination of tariff reviews etc.

¹¹⁷ Fiscal volatility and political upheavals are not as unexpected as they once were. The international business community has developed means by which to address these issues and so therefore should governments. In this respect international business practice is to place more importance on maintaining the relationship is more important than holding a party hostage to the original contract terms.

¹¹⁸ Allowing post hoc renegotiations every time there is a change in circumstances could reduce substantially the use of the PPP agreement as a risk allocation tool. In other words the PPP agreement sets out the overall risk allocation that the parties are prepared to absorb and the allowance of renegotiation events should be carefully circumscribed.

participation in a contract has become unfeasible through no fault of its own but as a result of disruption to the main assumptions that underpinned the original contractual agreement, to seek renegotiation or termination of its contractual commitments.

In response to the grey area of renegotiation within the auspices of international law, international business has developed a proprietary set of rules to handle contractual renegotiation and adaptation¹¹⁹. Even in the absence of structured mechanisms, international business relies on general principles and use of mutual accommodation to reach a satisfactory renegotiation. Accordingly, renegotiation should be conducted in good-faith and with the knowledge that hopefully, each party will benefit from the re-balancing of the agreement. I recommend that the party that accedes to the other party's request for renegotiations should receive some form of concession to compensate it for its flexibility and to demonstrate to its constituents that it did make some form of advantage from the adaptation of the contract. Moreover, if renegotiation clauses are to be inserted, consideration must be given to the scope of events that trigger renegotiation – whether the events must be unforeseen and beyond the parties' control; whether the applicable laws recognize the ability of an arbitrator or third party to adapt a contract should renegotiations fail; and to provide for specific criteria to guide the arbitrator in acceptable adaptation procedures.

¹¹⁹ Experience from negotiated agreements from different countries and private independent consultants can assist governments and Developers in designing appropriate clauses.